

Internal Revenue Service

memorandum

CC:TL-N-7209-89

Br2:SJHankin

date: SEP 1 1989

to: District Counsel, Cleveland CC:CLE

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

This responds to your request for technical advice, dated June 14, 1989, concerning the following issue.

ISSUE

Who is the proper party to execute a consent (Form 872) to extend the period for assessment, where the common parent corporation was merged into another corporation.

FACTS

We incorporate herein by reference the facts supplied in your memorandum, dated June 14, 1989.

DISCUSSION

Treas. Reg. § 1.1502-77(a) provides that the consolidated return group's common parent shall be the sole agent for the group. Specifically, Treas. Reg. § 1.1502-77(a) provides that the common parent will give waivers for the group in its own name.

If, however, the common parent contemplates going out of existence, Treas. Reg. § 1.1502-77(d) requires the common parent to designate another member of the group to act as agent in its place. Such agency designation will, however, only be effective upon the approval of the district director. If proper notice is not given or the district director does not approve the designation, the remaining members may choose a replacement and give written notice of their choice to the district director. Until the district director approves the designation, any notification or communication to the common parent will be considered a valid notification to the group. However, if the district director has reason to believe that the common parent is no longer in existence, he may deal directly with any member in respect of its liability.

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You have inquired as to who should file a consent (to extend the statute) with regard to the consolidated tax liability of [REDACTED] and its subsidiaries for their fiscal tax year ending [REDACTED]. Since the tax year of the group ending [REDACTED] is the year to which the [REDACTED] NOL is carried and also the year to which the investment tax credit arising in [REDACTED] is carried, the tax year at issue is the [REDACTED] group's fiscal tax year ending [REDACTED].

In applying Treas. Reg. § 1.1502-77(d) to the instant case a threshold determination must be made as to whether [REDACTED] has gone out of existence. It is the position of this office that whether a corporation has ceased to exist is a question of state law, since a corporation is an entity created by state law. The specific question is whether [REDACTED], a corporation organized in Massachusetts, went out of existence when it was merged into [REDACTED], also a corporation organized under Massachusetts law. Massachusetts law provides that upon the effective date of a merger or consolidation the separate existence of all the constituent corporations shall cease, except for any corporation into which any other constituent corporation or corporations have been merged. See, section 80(a)(1) of the Massachusetts Business Corporation Law. In connection therewith, we note that the certificate for merging [REDACTED] into [REDACTED] was filed by the parties involved with the Commonwealth of Massachusetts, pursuant to Massachusetts Business Corporation Law. Accordingly, we conclude that [REDACTED] went out of existence when it was merged into [REDACTED]. As such, the instant case is subject to the agency designation rules of Treas. Reg. § 1.1502-77(d). Yet, [REDACTED] failed to designate another member to act as agent for the group. Moreover, our understanding is that the remaining members of the [REDACTED] group have, to date, also failed to designate one of the remaining members to act as the agent for the group.

In the absence of any properly designated successor agent, the Service must deal directly with any member in respect of its liability. Pursuant to Treas. Reg. § 1.1502-6, each member is severally liable for the entire consolidated tax of the group. Accordingly, the Service can obtain separate consents from each of the remaining members of the [REDACTED] group, which includes [REDACTED] and [REDACTED]. In addition, two consents should be obtained from [REDACTED]: one, in its capacity as successor for [REDACTED] with respect to its successor liability for the tax liability of [REDACTED] and, two, in its capacity as transferee of the assets of [REDACTED].

As a precautionary matter, the district director should send [REDACTED] a notice (prior to obtaining the consents) that it is dealing directly with each member of the group with respect to its liability for the consolidated tax of the [REDACTED] group for its consolidated tax year ending [REDACTED]. This will comply with the notice requirement set forth in the last sentence of Treas. Reg. § 1.1502-77(a) in the event that [REDACTED] is somehow deemed to be a successor agent of the [REDACTED] group for its tax year ending [REDACTED].

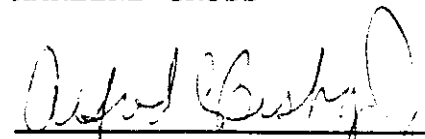
Alternatively, if the remaining members of the [REDACTED] group now wish to designate a corporation to act as the successor agent for the [REDACTED] group for its tax year ending [REDACTED], such successor agent must be [REDACTED] or [REDACTED] or [REDACTED] or [REDACTED]. In connection therewith, we wish to point out that [REDACTED] is not an appropriate designee agent, because it was not a member of the [REDACTED] group during its tax year ending [REDACTED]. In that regard, we note that no agency designation under Treas. Reg. § 1.1502-77(d) is effective until it is approved by the district director. Moreover, in order to accomplish this agency designation each of the remaining members of the [REDACTED] group must separately execute an agency designation. As a precautionary matter, we recommend that an agency designation should also be obtained from [REDACTED] in its capacity as the successor to [REDACTED].

Once the agency designation is properly made by those remaining members and approved by the district director, then and only then can that designee corporation properly execute a consent as the agent of the former [REDACTED] group with regard to the consolidated tax liability of that group for its tax year ending [REDACTED]. Even then, however, two consents should also be obtained from [REDACTED]: one, in its capacity as the successor to [REDACTED] and, two, in its capacity as transferee of [REDACTED] with regard to its consolidated tax liability for the tax year ending [REDACTED]. We believe that obtaining a consent from [REDACTED] in its capacity as the successor to [REDACTED] should also serve to protect the Service in the unlikely event that [REDACTED] is somehow determined to be the automatic successor agent of the former [REDACTED].

group. That is, in the event of such determination, the Service can point to such consent as having been filed by the appropriate agent of the [REDACTED] group.

MARLENE GROSS

By:


ALFRED C. BISHOP, JR.
Chief, Branch No. 2
Tax Litigation Division